90-1587

No. _____

Supreme Court, U.S.
FILED
APR 12 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CAPELETTI BROS., INC., et al.,

Petitioners,

v.

BROWARD COUNTY, FLORIDA, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

HERBERT P. SCHLANGER
Counsel of Record
for Petitioners

Suite 2220
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 588-1981

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

Do construction contractors, at whom a County's race-conscious bid specifications and "goals" are aimed and who must comply with those requirements, lack standing to challenge the constitutionality of such race-conscious requirements when compliance with the County's requirements (1) limits the exercise of their business judgment to select subcontractors and suppliers, (2) increases their costs and risks, (3) decreases their profits, (4) limits their freedom to choose the subcontractors they believe could best complete the work, (5) puts in jeopardy the quality of work and the contractor's reputation, and (6) decreases the opportunities for them to subcontract and supply materials to other non-minority-owned contractors?

LIST OF INTERESTED PARTIES

The following is a complete list of all parties with an interest in the outcome of this litigation. There are no parent or subsidiary companies which are required to be listed.

Petitioners:	Capeletti Bros., Inc.; Weekley Asphalt Paving, Inc.; Westwind Contracting, Inc.; and Hardrives Company
Respondents:	Broward County, Florida; and L.A. Hester

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OPINIONS BELOW

The district court opinion is reported at 738 F.Supp. 1415 (S.D.Fla., 1990) and is reproduced in the appendix to this petition at App.2. The Court of Appeals' summary affirmance is unreported and is reproduced in the appendix at App.1.

JURISDICTION OF THIS COURT

The Court of Appeals' decision in this matter was rendered on April 2, 1991, and this petition has been timely filed under the provisions of Rule 13 of the Rules of this Court. Jurisdiction to hear and decide this matter is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional provisions

Article III, § 2, Constitution of the United States:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made . . . under their authority. . . .

Amendment XIV, Constitution of the United States:

Section 1. Citizens of the United States.

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Statutes

a. 42 U.S.C. § 2000d. Nondiscrimination in federally assisted programs

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

b. 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioners are four non-minority-owned construction firms which sued to have declared unconstitutional Broward County's use of racial, ethnic, and sexual criteria in its construction contracts and bid specifications and its use of "goals" for minority-owned firm participation in public construction contracting. The district court dismissed the case on the pleadings. It held that these contractors, at whom the County's program is aimed, upon

whom the effects of the program fall, and who must comply with the program's race-conscious requirements, lacked standing. The Court of Appeals summarily affirmed on the authority of *Cone Corporation v. Florida DOT*, 921 F.2d 1190 (11th Cir., 1991), *cert.* petition pending, case number 90-1535 (1991).

The verified complaint alleged that, in awarding contracts for public construction contracting, Broward County used suspect categories (race and ethnicity) without having any "compelling interest" in doing so, used sexual categories without it serving any properly remedial purpose (*i.e.*, not being either rationally or "closely" related to the achievement of any proper or "important" purpose), and that, even if the County could demonstrate any such interest, it had failed to tailor its "remedy" narrowly.

With regard to the effect on the petitioners, the verified complaint alleged that each of the plaintiffs "bids as a prime contractor on projects let by Broward County, and it intends to bid on such projects in the future." It further alleged that each of them "also bids as a subcontractor and supplier to other companies which bid as prime contractors on construction projects let by Broward County." *See*, Complaint, paragraphs 3 through 6. The complaint went on to allege:

VI.

EFFECT ON THE PLAINTIFFS; IRREPARABLE HARM

48. Plaintiffs have in the past, currently do and will in the future seek to perform work in the construction industry for Broward County.

49. Plaintiffs have been injured in their business or property as the result of the MBE utilization requirements currently being enforced by Broward County in the award of construction contracts.

50. The MBE utilization requirements imposed by Broward County limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs and risks, decrease its profits, limit its freedom to choose the subcontractor it believes could best complete the work and put in jeopardy the quality of work and the contractor's reputation.

51. The MBE utilization requirements imposed by Broward County decrease the opportunities for non-MBE subcontractors and materials suppliers to participate on contracts let by the county.

52. Non-MBE general contractors and subcontractors, including the plaintiffs, bear a disproportionate share of the burden imposed by Broward County's MBE set-aside programs in the construction industry.

53. Unless this Court enjoins the unlawful and unconstitutional conduct of Broward County, plaintiffs will, in the future, be injured in their business or property in ways which are difficult or impossible to quantify in money and which are difficult or impossible to remedy.

54. Plaintiffs have no adequate remedy at law to prevent future unconstitutional discrimination by Broward County in the awarding of construction contracts.

The district court found these allegations insufficient to confer upon these contractors standing to attack the County's use in the bidding process of racial, ethnic and sexual criteria. The court acknowledged that the complaint alleged that "the plaintiffs, as contractors and subcontractors, are losing money because they have to follow Broward County's requirements in bidding on public construction projects." It determined, however, that this *could not be true* because "[i]t would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program. . . . ".

The district court also held that these contractors lacked standing because there was insufficient "individualized" injury alleged:

> All the contractors and subcontractors who wish to bid on public projects in Broward County must adhere to the requirements of the set-aside program. . . . Therefore, even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirement.

Finally, the district court noted (correctly) that the petitioners had not alleged that they had ever lost a contract because of the County's race-based requirements and pointed out that the contractor which prevailed in *City of Richmond v. J.A. Croson Company*, 109 S.Ct. 706 (1989), had, in fact, lost a contract and therefore had standing. The district court concluded by stating:

> Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. . . . Under Article III § 2 of the Constitution, this court can only decide cases and controversies. This lawsuit, under the allegations in the plaintiff's complaint, does not satisfy this requirement.

The Court of Appeals summarily affirmed and this petition followed.

ARGUMENT – REASONS FOR ALLOWANCE OF THE WRIT

The district court's analysis of the Article III "standing" requirement limits the universe of potential plaintiffs who may challenge various "disadvantaged enterprise programs" to those contractors who have, because they did not comply with the race-, ethnic-, and sex-conscious requirements imposed by such a program, failed to win a contract on which they were the low bidders. This is unduly restrictive, is unrealistic, is in conflict with the decisions of this Court, of other Courts of Appeals, and of district courts in other Circuits, and serves to distort the law of standing in very undesirable ways.[1] *Certiorari* should be granted to correct this radical

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[1] It should be noted that, in arriving at its conclusion that the petitioners lacked standing, the district court made findings of fact contrary to the allegations contained in the verified complaint and contrary to the evidence in the record. Fact-finding is not a proper function of a court when determining a

(Continued on following page)

departure from two centuries of precedent and to resolve the conflict between the Eleventh Circuit's approach to standing in cases of this nature and that taken by other courts (including this Court).

1. Petitioners have sufficiently alleged their standing

The decision rendered by the district court and summarily affirmed by the Court of Appeals improperly restricts standing to challenge racial discrimination in public contracting only to those who can demonstrate that they have suffered economic injury through the loss of a contract on which they were the low bidder and which was denied them because they failed to conform to the unconstitutional requirements imposed. *Certiorari* should be granted to make clear that all those who are directly affected by the use of unconstitutional race-conscious bid specifications and "goals", such as the petitioners in this case, (and not only disappointed low bidders) have standing to challenge such governmental programs.

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motion to dismiss pursuant to Rule 12(b)(6), Fed.R.Civ.P. If the court's analysis of the "standing" requirement was erroneous, as petitioners believe that it was, then there *was* sufficient evidence in the record to deny the motion to dismiss. The complaint was verified and the sworn testimony of the principals of two of the plaintiffs (as to the effects that programs of this sort have on their companies) was submitted to the court and is part of the record. This is sufficient if the petitioners' view of what is required to confer standing is adopted.

The standing and ripeness doctrines arise, in large part, out of consideration of the limitation on the judicial power contained in Article III of the Constitution. This determination – of whether what a court is being asked to do is to decide a "case or controversy" – must be made on a case-by-case basis. The doctrine was never intended to be used (and petitioners are unable to find any decision of this Court in which it has been used) to deny the right to sue to a party at whom a challenged government-imposed requirement is aimed and who must comply with that challenged requirement, to its detriment, in order to remain in business.

The determination of whether a party has standing in a particular case is usually made by evaluating several overlapping and interrelated considerations, some of which are prudential and some of which are constitutionally required. None of these considerations either requires or should have resulted in a dismissal in this case.

Stated most basically, for there to be a "case" within the meaning of Article III there must be a "real" issue presented for judicial resolution (and not one that is merely abstract, hypothetical or contingent, *i.e*, a request for an advisory opinion). There *is* such a "case" in this litigation.

Courts of the United States do not, of course, give advisory opinions. This is a basic tenet. Advisory opinions are necessarily hypothetical and, therefore, do not present a "case" which is ripe for adjudication. In such a situation there are no adverse parties, the "facts" are

fiction (by stipulation or presumption) and require speculation (because they may never exist) and the injury (if any) has not occurred and is not immediately threatened. These sorts of cases are not decided by the courts of the United States and with this proposition petitioners do not quarrel.

Given this necessary aversion to deciding controversies which are presented in hypothetical circumstances, standing to contest unconstitutional governmental action necessitates a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and in a form historically viewed as capable of judicial resolution." *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-52 (1970). In this case the parties are clearly adverse; the manner in which the County's race-conscious program is enforced is not hypothetical or speculative (since it has been operating for some period of time); the petitioners have been complying, to their detriment, with the unconstitutional requirements imposed by the County; they will, in the future, have to continue to comply if (as alleged) they desire to engage in public construction contracting in Broward County; the controversy is presented in a form capable of judicial resolution; and the courts of the United States have the power to grant relief which will alleviate the harms of which petitioners complain.

To assure that courts do not give advisory opinions, and to insure that they exercise only the power described in Article III, the courts subject constitutional challenges to examination in several ways. None of the tests is absolute, however, and the determination of whether a particular lawsuit falls within the Article III parameters

necessarily involves the application of informed judicial discretion. As Justice Frankfurter said:

> The jurisdiction of the federal courts can be invoked only under circumstances which to the expert feel of lawyers constitute a "case or controversy".
>
> *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 149 (1951)

Although the precise outer limit of the "standing" doctrine may not be marked with a bright line, this case presents circumstances well within the established boundaries and which, most lawyers would feel, would "constitute a 'case or controversy' ". *Certiorari* should be granted to insure that the standards for standing applied to non-minorities who sue to enforce constitutional civil rights guarantees are the same as those applied to minority plaintiffs who do the same.

First, to fit within the judicial power as defined by Article III, the issues presented must be "ripe" for judicial resolution. This, in essence, seeks an answer to the question: "Can the court be reasonably certain that it is deciding a concrete issue based on concrete facts?" (*i.e.*, has the controversy matured to a point where the facts won't change to avoid or eliminate the need for judicial intervention and has the injury occurred [or is it imminent]?) The answer, in this case, is "yes". Broward County's use of race-conscious criteria has been enforced for some time, continues to be enforced, and will be enforced in the future. The manner in which it operates and affects these petitioners is not a matter for conjecture and there

is no indication that the unconstitutional discrimination it commands will cease absent judicial intervention.

Second, the case must not turn on moot questions. If a case is moot, there is nothing upon which the decision may operate. The "case" has been resolved and judicial action will not afford the plaintiff any relief.[2] As noted, this case is far from moot; the County continues to impose its race-conscious requirements on the petitioners.

Third, there must be adverse litigants. *See, e.g., Muskrat v. United States*, 219 U.S. 346 (1911).[3] Here there is no question but that this is no "friendly suit"; the litigants are truly adverse.

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[2] To even this rule, however, there is an exception: if the action challenged is "capable of repetition, yet evading review". Thus, this must be a prudential, not a constitutional, consideration.

[3] In *Muskrat*, the Court struck down the portion of a statute which authorized a test suit to determine the validity of a statute allocating Indian lands. In that case, the attorneys for both sides were to be paid by tribal funds deposited in the Treasury. No dispute between the parties existed as to title to the land, nor did the parties dispute the constitutionality of the statute, but they merely wanted a judicial confirmation of the constitutionality of the substantive provisions of the statute. This was held to be outside the judicial power of the Court. When an actual controversy later arose concerning the substantive aspects of the legislation, and the Indians sued to enjoin the Secretary of the Interior from enforcing the statute, they obtained a decision on the merits, *Gritts v. Fisher*, 224 U.S. 640 (1912).

Fourth, and related to the requirement of "adverseness", the suit must not be collusive or feigned.[4] There is, however, nothing collusive or feigned about this suit; it is brought by entities which are being forced to comply with unconstitutional governmental requirements imposed by the County and which the County is defending vigorously.

Fifth, the injury complained of must either have actually occurred, *United Public Workers v. Mitchell*, 330 U.S. 75

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[4] *See, e.g., Lord v. Veasie*, 8 How. (49 U.S.) 251 (1850). The proper dichotomy was succinctly described by this Court in *Chicago & G.T. Ry. Co. v. Wellman*, 143 U.S. 339 (1892):

> Whenever, in pursuance of an honest and actual antagonistic assertion of rights by one individual against another, there is presented a question involving the validity of any act of any legislature, State or federal, and the decision necessarily rests on the competency of the legislature to so enact, the court must . . . determine whether the act be constitutional or not; but such an exercise of power is the ultimate and supreme function of courts. It is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy between individuals. It never was the thought that, by means of a friendly suit, a party beaten in the legislature could transfer to the courts an inquiry as to the constitutionality of the legislative act.
>
> *Id.*, 143 U.S. at 145

But compare, e.g., Hylton v. United States, 3 Dall. 171 (1796); *Fletcher v. Peck*, 6 Cr. (10 U.S.) 87 (1810); *Scott v. Sanford*, 19 How. (60 U.S.) 393 (1857); and *Powell v. Texas*, 392 U.S. 514 (1968) (all actions resulting in constitutional decisions in which friendly parties contrived to bring the suit and in which the suits were supervised and financed by one side).

(1947), or the injury must be likely to occur. *Warth v. Seldin*, 422 U.S. 490 (1975); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

Warth required that there must exist a "substantial probability" that, absent the challenged restriction, the plaintiff would have not suffered the harms alleged and that, "if the court affords the relief requested, the asserted [injury to] petitioners will be removed." *Id.*, 422 U.S. at 504. The requirement was not satisfied in *Warth* because no plaintiff owned property in the city, "none is himself subject to the ordinance's strictures; and none has even been denied a variance or permit by respondent officials", *ibid.*, and they did not allege or show that, if those directly affected (builders) had been permitted to build the housing, those projects "would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners. . . . In short, the facts alleged fail to support an actionable causal relationship between Penfield's zoning practices and petitioners' asserted injury." *Id.*, 422 U.S. at 506.

> We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm him, and that he personally would benefit in a tangible way from the court's intervention.[18]

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[18] This is not to say that the plaintiff who challenges a zoning ordinance or zoning practices must have a present contractual interest in a particular project. A particularized personal interest may be shown in

> various ways, which we need not undertake to identify in the abstract. . . .

Id., 422 U.S. at 508

In *Arlington Heights*, however, an individual who alleged that he would apply to live in the low-income housing project which would be built if the zoning were changed was held to have standing to contest the allegedly racially-discriminatory determination not to rezone a parcel of land, *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264 (1977).[5]

The petitioners in this case are affected far more directly, far more immediately and far more concretely than the plaintiffs in either *Warth* or *Arlington Heights* were. As noted by Mr. Capeletti in his sworn testimony in the case of *Capeletti Brothers v. Dade County*[6], when a contractor has to subcontract out work to a minority contractor, which is work that the contractor would normally perform himself, the contractor faces substantial risk because it is ordinarily the one responsible for the performance bond. In addition, if the contractor is forced to subcontract out the controlling item of work, the contractor may face delays or other problems which it cannot

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[5] Standing was found although it was necessary to indulge four "if"s, an inference and a prediction: *i.e., if* the zoning were found to be racially discriminatory (the issue being litigated) and *if* it were changed as MHDC requested and *if* MHDC built the project then *if* Ransom [the individual plaintiff] applied it *appeared* that he would qualify and he *alleged* he would move in.

[6] This testimony was made part of the record in this case. See, "Transcript of Proceedings", included in docket number 32, p.21.

control, but which then affect that contractor's ability to complete its own work. Moreover, the contractor obviously fails to reap his expected profit on items it is required to subcontract to others. These petitioners should have standing to challenge the County's program.

Sixth, the injury must be of a type which can be alleviated by judicial action.[7] The injury need not be economic to confer standing,[8] and – whether economic or not – it can be very small and still afford standing.[9] These

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[7] Certainly, if a court cannot fashion relief effectively to prevent or remedy the harm claimed, there cannot be a "case or controversy" which is properly justiciable.

[8] *Arlington Heights*, 429 U.S. at 262-3:

> Petitioners' argument also misconceives our standing requirements. It has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing. *United States v. SCRAP*, supra, 412 U.S., at 686-687, 93 S.Ct., at 2415; *Sierra Club v. Morton*, 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); *Data Processing Service v. Camp*, 397 U.S. 150, 154, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). MHDC is a nonprofit corporation. Its interest in building Lincoln Green stems not from a desire for economic gain, but rather from an interest in making suitable low-cost housing available in areas where such housing is scarce. This is not mere abstract concern about a problem of general interest. See *Sierra Club v. Morton*, supra, 405 U.S., at 739, 92 S.Ct., at 1368.

[9] Injury in fact . . . serves to distinguish a person with a direct stake in the outcome of a litigation – even though small – from a person with a mere interest in the problem. We have allowed important interests to be vindicated by plaintiffs with no more at stake . . . than a fraction of a vote, see *Baker v. Carr*,

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petitioners clearly have more than a "mere abstract concern about a problem of general interest", *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). The unconstitutional requirements are directed at these petitioners, it is they who are being forced to comply with those unconstitutional requirements and it is they who are absorbing a significant cost and losing work[10] for having to do so.

Seventh, the plaintiff must not be suing solely in his capacity as a "taxpayer". If standing is sought solely on the status of a plaintiff as a "taxpayer", there can, by definition, be no individualized injury, since the harm alleged is necessarily rooted in the *expenditure* of revenue (rather than the raising of it), so there is no "harm" suffered from any *payment* of taxes which judicial intervention will alleviate, and if the only effect which can be alleged by the plaintiff is his "taxpayer" status, it is unlikely that he is suffering any more direct effect from the challenged activity.

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389 U.S. 186, a $5 fine and costs, see *McGowan v. Maryland*, 366 U.S. 420, and a $1.50 poll tax, *Harper v. Virginia Bd. of Education*, 383 U.S. 663.

United States v. SCRAP, 412 U.S. 669 (1973).

[10] The district court decision ignores the effect on these petitioners from having to subcontract out to others, in order to meet race-conscious subcontracting "goals", work which they would otherwise complete with their own work force and equipment. This has both economic effects (*e.g.*, reduced profits and increased costs) and intangible effects (the non-quantifiable but real effect on the rate of growth of the petitioners' businesses).

Here the petitioners do *not* allege that their standing is based on any objection to the way in which the County is either collecting or expending funds but, rather, on the effects the County's actions have on them. The mere fact that *other* contractors share the burden of the County's racially discriminatory requirements and suffer similar injury does not deprive *these* petitioners of standing. If *that* were a proper application of the standing doctrine, then *no* one would have standing to challenge *any* widespread governmental discrimination because they would be suffering no injury unique to them but only the injury suffered by all of their race or group. The district court opinion expanded and distorted the "individualized injury" requirement beyond recognition and should be reversed.

Eighth, the litigant must be asserting a harm to his own rights or to those of another which directly affects his own rights. Compare *Warth v. Seldin*, 422 U.S. 490 (1975) with *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). The basic rule is that rights of others may be asserted if there is a direct, derivative effect on the plaintiff or if the right is being asserted in a representative capacity. In this case, plaintiffs are asserting their own rights – that they should be free to choose subcontractors and suppliers without regard to race; they have also asserted that, since they also function as subcontractors and suppliers, they have a right to bid and to be chosen without regard to race and that the denial of that right directly affects them.[11]

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[11] At least one other aspect of determining whether there is a justiciable claim presented is the "political question"

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Finally,

> Standing to contest unconstitutional governmental action necessitates a litigant who has sustained or will sustain an injury so that he will be moved to present the issue "in an adversary context and *in a form historically viewed as capable of judicial resolution.*"
>
> *Ass'n of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-52 (1970) (emphasis supplied).

These petitioners have certainly alleged that they have "sustained or will sustain an injury" and they clearly have been "moved to present the issue 'in an adversary context and in a form historically viewed as capable of judicial resolution.' " A declaration as requested (and an injunction requiring judicial review before imposition of any other race-, ethnic- and sex-conscious program) will alleviate the actual and threatened harms complained of by the plaintiffs.

Since the issues on the merits of this litigation are (1) whether the County has a "compelling interest" in utilizing race-conscious bid specifications and "goals"[12] and (2) if so, whether the County's remedy has been "narrowly tailored" to the identified discriminatory practices or effects sought to be eliminated, the precise harm

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doctrine. This aspect of the "case or controversy" doctrine is not implicated in this litigation.

[12] *I.e.*, whether the County has facts with which it can identify discriminatory practices or effects that it supposedly now seeks to remedy through the use of these race-conscious bid specifications and "goals".

caused is not so significant as the fact that the program has had *some* actual effect on these petitioners. Standing to obtain an adjudication of the constitutionality of the County's race-conscious program does not depend on *how* the plaintiffs have been injured, but upon the fact that they are directly affected by the program's race-conscious bid specifications and "goal" requirements.

2. The Court of Appeals decision conflicts with decisions in other Circuits

The decision rendered by the district court and summarily affirmed by the Court of Appeals conflicts not only with two centuries of precedent in this Court, but with a number of recent decisions of courts in other Circuits which have considered the "standing" issue in the context of challenges to minority "set-aside" enactments. *Certiorari* should be granted to resolve this conflict and to make explicit the proper standard to be used in cases such as this.

The Court of Appeals has earlier cited to the district court decision in this case with approval and has acknowledged that the position it has taken on the standing requirement (and the position taken by the district court in this case) is in conflict with decisions rendered by at least three other courts in two other Circuits:

> The contractor is not actually injured by these increased costs because it simply includes them in its bid and passes the cost on to the FDOT. *See Capeletti Bros. [v. Broward County,* 738 F.Supp. at 1417 (stating that "[i]t would be the irrational businessman who did not factor such costs into his bid. . . . [I]t is the [governmental entity] who

> ultimately absorbs the costs of its program by paying more to complete public construction projects"). Even if the contractor does not always include the increased cost in its bid, as the plaintiffs' evidence seems to indicate, the resulting smaller profits are a problem common to all contractors. *See id.* ("even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders"). *But see Contractors Ass'n [v. Philadelphia]*, 735 F.Supp. [1274] at 1283-1284 n.3 [(E.D.Pa., 1990)] (finding standing for an association of contractors who alleged, *inter alia*, that the expenses of one contractor member on a specific contract were higher because of the MBE requirements); *Rhode Island Chapter, Associated Gen. Contractors v. Kreps*, 450 F.Supp. 338, 346-7 n.3 (D.R.I. 1978) ("even the successful bidder reduces his profit by having to subcontract work he could have performed himself"); *Constructors Ass'n v. Kreps*, 441 F.Supp. 936, 945-46 (W.D.Pa. 1977).
>
> *Cone Corporation v. Florida DOT*, 921 F.2d 1190, 1210 fn.57 (11th Cir., 1991), *cert.* petition pending, case number 90-1535.

The decisions in *Contractors Ass'n v. Philadelphia*, 735 F.Supp. 1274 (E.D.Pa., 1990), *Rhode Island Chapter, Associated Gen. Contractors v. Kreps*, 450 F.Supp. 338 (D.R.I. 1978), and *Constructors Ass'n v. Kreps*, 441 F.Supp. 936 (W.D.Pa. 1977), were all rendered in conformity with the law of standing as articulated by the First and Third Circuits[13], reflect the more traditional analysis of

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[13] *See also, e.g., Michigan Road Builders v. Milliken*, 834 F.2d 583 (6th Cir., 1987), *aff'd*, 109 S.Ct. 1333 (1989), reaching the

(Continued on following page)

standing, and are in conflict with the law as articulated by the Eleventh Circuit in *Cone Corporation* and in this case.

In light of the large number of cases now pending which challenge the use by various governmental entities of race-conscious bid specifications and "goals" and the paucity of plaintiffs and potential plaintiffs who have been denied contracts because of a failure to comply with any program's requirements,[14] it is important for this Court to grant *certiorari*. This Court should reverse the

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(Continued from previous page)

merits of the constitutional question but necessarily assuming, *sub silentio*, the existence of a "case" or "controversy". The Court of Appeals for the Seventh Circuit also recently reached the merits of a case where the contractor-plaintiffs alleged effects similar to those which the Eleventh Circuit has now decreed are insufficient to confer standing. *See, Milwaukee County Pavers Ass'n v. Feidler*, 922 F.2d 419 (7th Cir., 1991).

[14] Most contractors, of course, make every effort to comply with the various race-conscious requirements, even if they are unconstitutional, because they are unwilling to risk losing the contract. Thus it will be the exception, rather than the rule, to find a contractor who is the low bidder but whose bid fails to comply with the minority utilization requirements.

Even with such efforts, however, a contractor may fail to comply with the program's requirements and lose a contract. *See, e.g., Cone Corporation v. FDOT*, 921 F.2d at 1206, fn.50 ("Cone alleged, in his deposition, that his company had lost a specific contract on which it had been the low bidder because it failed to meet the DBE goal for the contract.") and the identification of that specific contract at page 10, fn.10, of the pending petition for *certiorari* filed in that case.

Court of Appeals' decision so that the doctrine of standing will not be transformed into an insurmountable hurdle barring relief to those who are most directly affected by these unconstitutional, but politically popular, programs.

CONCLUSION

For all of the foregoing reasons, a writ of *certiorari* should issue and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

HERBERT P. SCHLANGER
Attorney for Petitioners

Law Offices Of HERBERT P. SCHLANGER, P.C.
Suite 2220
230 Peachtree Street, N.W.
Atlanta, Georgia 30303
(404) 588-1981

APPENDIX

1. Order of the Court of Appeals for the Eleventh Circuit, April 2, 1991.....App. 1

2. Order of the District Court, June 28, 1990... App. 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 90-5725
Non-Argument Calendar

D.C. Docket No. 90-6204-CIV-JAG

CAPELETTI BROTHERS, INC.,
WEEKLEY ASPHALT PAVING, INC.,
WESTWIND CONTRACTING, INC.,
and HARDRIVES COMPANY,

Plaintiffs-Appellants,

versus

BROWARD COUNTY and L. A.
HESTER, the administrator of
Broward County,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(April 2, 1991)

Before HATCHETT, CLARK and COX, Circuit Judges.

PER CURIAM:

AFFIRMED on the basis of *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir. 1991).

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION

CAPELETTI BROTHERS, INC.; WEEKLEY ASPHALT PAVING, INC.; WESTWIND CONTRACTING, INC.; and HARDRIVES COMPANY;

Plaintiffs,

v.

BROWARD COUNTY and L.A. HESTER,

Defendants.

Case no. 90-6204-CIV-JAG

ORDER

THIS CAUSE has come before the court upon the motion of the defendants to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(B)(6). The plaintiffs have filed an opposing response and the defendants replied. The court has also heard oral argument of able counsel at the hearing held on May 11, 1990.

The plaintiffs are general and subcontractors who have an intend in the future to bid on building projects let by Broward County, Florida. The contractors challenge the legality of the County's set-aside program under the Equal Protection guaranty of the Fourteenth Amendment to the U.S. Constitution. Effective in 1985, Broward County adopted a program to aid minority contractors

entitled Small Disadvantaged Business Enterprise Affirmative Action Program(the program or set-aside program). The program applies to "small, disadvantaged business enterprises", which are defined as businesses owned and operated by one or more of the following categories of individuals: Black Americans, Hispanic Americans, Asian-Pacific Americans, Native Americans, Asian-Indian Americans, women, and other persons found to be "socially and economically disadvantaged". See Broward County, Fla., Code §20-275(2).

This court need not reach the merits of the plaintiffs' constitutional challenge because there is a lack of standing, ripeness, and a case and controversy. As noted by the Supreme Court in *Warth v. Seldin*, 422 U.S. 490, 498(1975), these are "threshold questions in every federal case, determining the power of the court to entertain the suit." Because there is also no indication that the plaintiffs can amend their pleading to cure the deficiencies, leave to amend shall not be granted and this case shall be dismissed. In making this determination, the court is mindful that the plaintiffs' allegations in the complaint must be taken as true. Also, any reasonable inferences which can be drawn from the allegations must be construed in favor of the plaintiffs. Nonetheless, it is the plaintiffs' pleading burden to allege sufficient facts in the complaint to allow the court to determine these threshold matters.

In addition, the plaintiffs' challenge cannot be sustained as a facial constitutional attack. The set-aside program is not mandatory, but rather a set of guidelines applied by the county to specific projects. In the program's general statement, it is noted that the county is to use "annual goals", rather than a required minimum

amount of minority business enterprises in public projects. Broward County, Florida, Code §20-275. More explicitly, section 20-276(1) states: "Goals for participation of small, disadvantaged business enterprises in county contracts shall be benchmarks for achievement, not mandates for complete attainment." *Also see* Code §20277(1)(set-aside's defined as applicable to "particular" contracts). Therefore, the issue is whether the county's program, as applied, is unconstitutional and whether it meets the threshold requirements of a justiciable controversy.

First, the plaintiffs lack standing to object to the county's program because they lack an injury-in-fact. The complaint states, in paragraphs 50 through 52, that the set-aside program limits their business judgment, increases costs and risks, decreases profits, decreases business opportunities, and "limit[s] . . . freedom to choose the subcontractor [who] . . . could best complete the work and put in jeopardy the quality of work and the contractor's reputation." These allegations all address economic injury; in other words, the plaintiffs, as contractors and subcontractors, are losing money because they have to follow Broward County's requirements in bidding on public construction projects. However, on its face, the complaint is deficient. Accepting as true that the set-aside program increases costs, there is no injury to the bidders or their profits. It would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program by paying more to complete public construction projects. In effect, then, the plaintiffs only are objecting to the program on the basis of their status as

taxpayers. There has, however, been no showing that the plaintiffs fit within any exception to the general rule that there is no independent ground to challenge government conduct merely on the basis of one's status as a tax paying citizen.

Second, even if there is an injury-in-fact, it is not individualized. All the contractors and subcontractors who wish to bid on public projects in Broward County must adhere to the requirements of the set-aside program, unless the guidclines are waived upon appropriate application. Therefore, even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirement.

Furthermore, the plaintiffs have failed to specify any particular project, which caused them harm. There is no allegation that they submitted a nonconforming bid that was rejected, that they lost any bids, that the program precluded them from submitting a bid, or that they applied for a waiver under the statutory scheme which was refused by the county. There might be a different result if the plaintiffs had lost a bid, where they had the lowest bid, but could not comply with the requirements of minority participation. Moreover, if they had got the bid, but then applied for a waiver because the minority businessman was unable to perform and the county refused to waive the program requirements, then this court might have a case and controversy.

The lack of specific projects is also important to the element of ripeness. As the plaintiffs agree, each public construction project in Broward County is funded by a variety of federal, state, and local monies. The difficulty in judging the constitutional validity of the defendant's program is that there are varying standards, depending upon whether federal or state and local monies are involved. As noted in *City of Richmond v. Cronson*, ___ U.S. ___, 1209 S.Ct. 706, 726-27(1989), the federal government may utilize broader means to combat discrimination without running afoul of the Equal Protection Clause. In its complaint, the plaintiffs focus upon the county's program, without any reliance upon any particular project.

The plaintiffs understandable rely upon the *Cronson* decision. On the merits, the case is certainly supportive of the plaintiffs' position. However, that case reached the Supreme Court in a very different posture than this litigation. In *Cronson*, the city of Richmond, Virginia invited bids for provision and installation of plumbing fixtures at the city's jail. A contractor decided to submit a bid, but he could only comply with the city's set-aside program if he could obtain a minority business to supply the fixtures. However, no minority business enterprises were interested in the project. Cronson submitted his bid and he was the only bidder on the project. Subsequent to the opening of the bids, Cronson still was not able to secure minority participation and he therefore, applied for a waiver of the set-aside requirements from the city. A minority business finally agreed to provide the fixtures for the project, but it would cost Cronson extra monies which he had not factored into his bid. Therefore, he also applied to the city to increase the price of the bid to

reflect these extra costs. The city denied both this application and the waiver request and, when Cronson was not able to find another minority supplier, decided to rebid the project.

In *Cronson*, but for the requirements of the set-aside program, the contractor would have obtained the job. *In this case, the complaint does not allege that they have ever lost a single project because of Broward County's requirements.* Armed with the Supreme Court decision, the plaintiffs come to court and ask the undersigned, in effect, to set itself up as a constitutional board of inquiry and issue an advisory opinion on the constitutionality of the county's program. Especially when a case presents an issue of constitutional law, the court will decline to cull the statute books when no specific factual situation is presented. Under Article III §2 of the Constitution, this court can only decide cases and controversies. This lawsuit, under the allegations in the plaintiff's complaint, does not satisfy this requirement.

Therefore, having considered the motions and the record in this cause, it is hereby

ORDERED AND ADJUDGED that the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) is **GRANTED**. The plaintiffs have no standing in this lawsuit and their dispute is not ripe or a case and controversy. For the reasons stated above, leave to amend shall not be granted and the complaint shall be **DISMISSED**.

The plaintiffs' motion for a preliminary injunction is hereby **DENIED**.

The defendants' motion for a protective order is hereby **DENIED**. The pendency of a Rule 12 motion is not a valid basis for barring discovery prior to a decision of the court. Such a matter is an issue addressed to the pleadings, even though it can, as a practical matter such as here, terminate the lawsuit.

DONE AND ORDERED this 28th day of June, 1990.

/s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES
DISTRICT JUDGE

CC: Henry Latimer
Charles Caulkins
Herbert Schlanger

90-1587

No. 90-1587

Supreme Court, U.S.
FILED
MAY 28 1991
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

CAPELETTI BROTHERS, INC., WEEKLEY ASPHALT PAVING, INC., WESTWIND CONTRACTING, INC., and HARDRIVES COMPANY,

Petitioners,

vs.

BROWARD COUNTY, and L.A. HESTER, the Administrator of Broward County,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. COPELAN, JR., ESQ.
Broward County Attorney
Government Center
Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301

ARTHUR J. ENGLAND, JR., ESQ.*
HENRY LATIMER, ESQ.
CHARLES M. AUSLANDER, ESQ.
FINE JACOBSON SCHWARTZ NASH BLOCK & ENGLAND
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000

Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

19pp

QUESTION PRESENTED (RESTATED)

Whether a non-minority construction contractor has standing to challenge a county disadvantaged business enterprise ordinance in the absence of an allegation that a specific contract bid has been rejected for noncompliance with the law.

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STATEMENT OF THE CASE

The statement of the case provided by petitioners omits highly relevant factual information regarding the precise nature of the county ordinance challenged. The Disadvantaged Business Enterprise ("DBE") Ordinance assailed is a law directed to increasing the participation of small, disadvantaged business enterprises in county-administered procurement projects. The ordinance does not employ a mandatory quota system, or bind specific contracts to a set-aside pool.

Rather, it is a policy statement favoring affirmative action when necessary to attain broadly stated annual goals for the participation of disadvantaged minority contractors. *See,* County ordinance, § 20-275(1) and the opinion of the district court at petitioners' App. 3. The ordinance specifically cautions that its goals are "benchmarks for achievement, not mandates for complete attainment." § 20-276(1); Pet. App. 4. A waiver of the participation goal may be obtained on any contract opened for bidding by the county. The ordinance possesses only a rebuttable presumption that a minority contractor is disadvantaged. § 20-275(2)(a)-(c). If the presumption is challenged, then the disadvantaged contractor and the county must establish the particularized existence of social and economic disadvantage before the ordinance is applied. § 20-275(2)(c)(2).

Given the nature of this law – a non-quota, non-set-aside, waiver endowed affirmative action policy – it is understandable that the district court would conclude that it had been requested "to set itself up as a constitutional board of inquiry [to] issue an advisory opinion on

the constitutionality of the county's program. . . . " In the absence of allegation that petitioners had ever lost a contract due to the DBE ordinance, the district court found their challenge to lack Article III § 2 standing or ripeness.

Two other factual statements in the petition require comment. Reference is made to "sworn testimony of the principals of two of the plaintiffs" regarding effects of this kind of ordinance on non-minority companies, including an alleged loss of a specific contract by one of the petitioners. (Petition at 6, n. 1). That testimony was not addressed to the DBE ordinance. It was commentary regarding the alleged effects of a different ordinance, with different characteristics, which had been adopted by a different county in Florida. (Petition at 14). Petitioners' request to the district court to take judicial notice of this testimony was never ruled on.

This record contains an unrebutted affidavit of a county contracting official, based on a review of county records, which was filed in connection with the county's motion to dismiss. That affidavit indicated that bids submitted by petitioners (1) were not accepted because more competitive bids had been submitted by other prime contractors who had complied with applicable DBE goals, (2) were in fact accepted as lowest responsive bid, or (3) in one instance were rejected as the lowest bid solely for lack of a required competency certification which had nothing to do with the DBE ordinance.

Lastly, petitioners certainly enlarge upon the record when they argue that they must comply with the DBE

ordinance to their detriment "in order to remain in business." (Petition at 8). Perhaps petitioners may be granted some room to wax emotionally in their advocacy, but the fact is they supplied no proof which would even remotely suggest that their ability to compete and survive in the construction business in Broward County was impaired by the existing DBE ordinance. Indeed, the contrary implication can readily be drawn from the county's affidavit, demonstrating that at least one of the petitioners had obtained a construction contract in compliance with the ordinance.

The district court dismissed the suit with prejudice, based on petitioners' acknowledgment that they could not amend their claims to assert a contract they lost by virtue of the DBE ordinance. The court of appeals affirmed summarily on the basis of *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991).

SUMMARY OF ARGUMENT

The petitioners do not have standing to challenge the DBE ordinance in the absence of pleading or proof that they have been denied a specific contract because of the law, or sought and obtained a waiver from application of the law. The mere fact that petitioners are contractors in Broward County, or that the DBE ordinance may increase their cost of doing business, does not change this result.

The law applies uniformly to all bidders for public contracts. There is no entitlement to a public contract and

assuredly no constitutionally-secured protection to a particular profit from a public contract. Petitioners' suggestion that compliance with the ordinance will impair their reputations or cause the demise of their businesses is an insubstantial and hypothetical concern.

The Eleventh Circuit decision in this case is consistent with decisions of the other courts of appeal. There is no reason for the Court to accept this case for plenary review on the basis of conflict.

ARGUMENT

1. Petitioners lack standing to sue.

The petitioners' argument on standing reads like a smorgasbord of case law fragments, diffusing the requirements of standing into nine questionable categories. (Petition at 10-18). This approach is a mask, designed to obscure their lack of the "injury-in-fact" which the law has always required. The Article III case or controversy requirement is traditionally viewed as a three-pronged test requiring (1) a clear demonstration of distinctive injury-in-fact, (2) causation, and (3) redressability. *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 1723 (1990). Each element must be separately shown, and courts are powerless to create jurisdiction by embellishing on deficient allegations of standing (*id.*) regardless of remonstrations that the consequence "is unduly restrictive, is unrealistic," or not in accord with what "most lawyers would feel, would constitute a 'case or controversy.' " (Petition at 6, 10). The three elements were not shown here.

At its core, the petitioners' argument consists of the view that compliance with the DBE ordinance harms them, for standing purposes, in two ways: (1) it increases costs so as to reduce their expected profits; and (2) it has an intangible effect on their reputation and quality of job performance, which in the long run will reduce the growth rate of their businesses. On these twin bases, they request a declaration of unconstitutionality and an injunction against continued use of the DBE ordinance. Nowhere in the record is there any suggestion that the ordinance has ever operated to deprive any of the petitioners of a single contract.

Petitioners' grounding for their suit, that the DBE ordinance exists and they do business in the county, has never been adequate to supply standing. First, the existence of government discrimination (assuming the ordinance does that) is not in and of itself a basis for relief. That is,

> an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court. '[A]ssertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.' (Citations omitted).
>
> Respondents . . . have no standing to complain simply that their Government is violating the law.

Allen v. Wright, 468 U.S. 737, 755-756 (1984).

Second, the petitioners have realistically raised no more than their status as interested public contractors to

challenge allegedly unconstitutional governmental conduct. A status-based claim has never sufficed to secure Article III standing. *Diamond v. Charles*, 476 U.S. 54, 66-68 (1986). Their mere presence as contractors ready and willing to perform public construction contracts does not satisfactorily allege injury "concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, ___ U.S. ___, 110 S.Ct. 1717, 1723 (1990). Petitioners have experienced no distinct and palpable injury. Their allegation of harm is neither actual nor imminent. Rather, it rests limply on the mere presence of a law, and their status as entities interested in changing that law. The vague fear that reputation and quality of workmanship will decline, unrooted in any specific example of such impact, must be rejected out of hand as too conjectural and hypothetical an expression of imminent or actual harm.

Decisively, the petitioners have failed to assert that any county bid has been foreclosed to them, or that one was not obtained after they sought a waiver of the DBE component in a particularized setting. Compare the grant of standing in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (specific bid lost because of set-aside requirement), with its denial in *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991) (no contract specific loss alleged or proved).

An additional flaw in the petitioners' position is inherent in their "lost profits" thesis. A private party seeking a public contract has no constitutionally-based right to a particular expectation of profit or level of cost. To demonstrate a property interest in a public benefit, including the fruits of a public contract,

> [a] person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.

Board of Regents v. Roth, 408 U.S. 564, 577 (1977).

Petitioners possess no entitlement to a public contract. They may harbor a unilateral expectation that they may obtain one, but nothing more. The Court recently reiterated this point in *Metro Broadcasting, Inc. v. Federal Communications Commission*, ___ U.S. ___, 110 S.Ct. 2997 (1990), which sustained an affirmative action program established for minority-owned applicants of broadcast licenses. The Court there expressed the view that no applicants possessed a

> settled expectation that their applications will be granted without consideration of public interest factors such as minority ownership. Award of a preference . . . thus contravenes 'no legitimate firmly rooted expectation[s]' of competing applicants (citation omitted).

110 S.Ct. at 3026. The Eleventh Circuit has faithfully applied this well-settled principle. *Cunningham v. Adams*, 808 F.2d 815 (11th Cir. 1987); *Economic Development Corp. of Dade County, Inc. v. Stierheim*, 782 F.2d 952 (11th Cir. 1986). The absence of generalized entitlement to a public contract assuredly means there is no constitutionally protected interest in petitioners' unilaterally anticipated profit from that desired contract.

Turning to petitioners' fragmentation of standing, it can be demonstrated that even their nine sub-theses provide no more substance to the case than its whole. Petitioners first argue their challenge is ripe. It is not, in light

of the absence of real or imminent injury as discussed above. Without project-specific pleading, there is no showing that an ordinance applied on a case-by-case basis and open to waiver will ever affect them. Additionally, the lack of project specificity means that the Court cannot know the parameters of an equal protection or due process inquiry, for differing standards may well apply to federally-funded, state-funded or "hybrid" affirmative action policies. *Croson*, 488 U.S. 469, 109 S.Ct. 706, 726-727 (1989).

Petitioners' second element is mootness. This point is itself moot, of course, because there is no concrete, ripened controversy based on true injury. Any mootness question is simply irrelevant to this dispute.

The third element noted is the requirement of adverse litigants. The parties' alleged adversity stems only from the fact that they are named adversely in the lawsuit. These non-minority contractors are not adverse to Broward County vis-a-vis any interest or stake which is relevant to standing, as the county's DBE ordinance has not caused them to lose a contract. Nor is its mere presence even distinctive to them, since all potential contractors must utilize a DBE component or obtain its waiver.

The fourth element addressed is that the suit not be collusive or feigned. While this is certainly not a friendly suit, this cannot overcome the lack of any real controversy that would arise, for example, from a contract-specific controversy.

Petitioners' fifth element finally reaches the question of Article III injury. All that has been previously said will not be repeated here to prove once again the obvious

shortcomings of petitioners' position on this point. Their reliance on *Warth v. Seldin*, 422 U.S. 490 (1975), and on *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), merits comment, however, if only to dramatize the insubstantial nature of their argument.

Petitioners here are like the prospective home builders who in *Warth* were found to lack standing for a failure to allege any specific project currently precluded by the zoning ordinance in question, or by the city's enforcement of it. *Warth*, 422 U.S. at 516. Those home builders further failed to allege that they had sought a variance from the ordinance with which they desired not to comply. *Id.* This is a direct parallel to petitioners' lack of project-specific pleading and to the absence of an averment that the DBE ordinance has caused a contract to be lost or an applied-for waiver denied.

Arlington Heights is no more fruitful for petitioners. The plaintiff there asserted a specific housing development to which he would move, but for the fact that discriminatory action had prevented its construction. In that circumstance, there could have been no more direct a proof of specific injury. Contrariwise, innumerable contracts have been let under the DBE ordinance here yet no government action has precluded these petitioners from obtaining a contract either by applying or by seeking a waiver.

The sixth factor addressed by petitioners is stated as a hybrid of injury and remedy. It addresses injury only, however, and even then is thrice flawed. The argument wrongly assumes that the mere existence of the ordinance

itself assures standing, which it does not. It wrongly asserts that added costs of compliance are constitutionally significant, which they are not. And it asserts that petitioners are losing work for having to comply with the ordinance, which is a factual flourish of the pen having no source in the record of this proceeding.

The seventh element proffered is that petitioners possess more than mere taxpayer status. Their having contractor status perhaps makes the contention true, but the argument misses the meaningful point. Like mere taxpayers (in the standing-deficient sense), petitioners are unable to demonstrate individualized injury because they can show no impact on them which is different from all others, similarly situated – that is, all other contractors. (Petition at 17). They must, of course, as *Croson* teaches. In that case, discrete injury befell a contractor who was barred by a set-aside mechanism from obtaining a specific contract. Notably, Croson's injury did not suffice as an at-large grant of Article III standing for all other potential Richmond contractors.

The eighth element proffered is that a litigant must assert harm to his rights or those of another which directly affect him. While this is a correctly stated subelement of the injury component of standing, it is not useful here. Petitioners argue that they should be free to choose subcontractors and suppliers without regard to race, or to bid and be chosen without regard to race. The Court's decision in *Metro Broadcasting* makes clear, however, that there is no absolute right to obtain a public contract without consideration of these factors. (In any event, the eighth element posed by petitioners is

decidedly a merits-based question which cannot be addressed in this case.)

The ninth element posed by petitioners is once again their unique re-characterization of the injury-in-fact component of standing. (Petition at 18-19). Their arguments boil down to assertions that a declaration of unconstitutionality will alleviate any potential harm to them, and that they are sufficiently "directly affected" by the DBE ordinance to make the dispute concrete. This version of the requirement that their injury be "distinct and palpable" is so watered-down as to be unrecognizable. The first prong is no more than an "ends justify the means" demand for relief. Petitioners' assertion that they may be directly affected by the ordinance, in the sense that they operate subject to the laws in Broward County, does not mean that Article III gives them license to test the constitutionality of the law.

In sum, the nine-factored incantation summoned by petitioners cannot magically conjure a concrete injury where there is none. They have no standing to challenge the ordinance.

2. The Court of Appeals decision does not conflict with other court of appeals decisions.

Neither the Court of Appeals' per curiam decision nor its earlier decision in *Cone Corp. v. Florida Dep't of Transportation*, 921 F.2d 1190 (11th Cir. 1991), conflict with any other federal appellate court decision. Although petitioners claim conflict with two other courts of appeal (the First and Third Circuits), they fail to cite a single federal appellate decision to support that claim. (Petition at 20).

Their reliance, rather, is on district court decisions in those circuits to establish purported conflict. This reliance in fact confirms the prematurity of review.

As always, review should be postponed until appellate courts have had the opportunity to consider the applications of standing doctrines articulated here and in *Cone*. Nor would the Court's jurisdiction be prudently exercised merely to review any challenge, however inconsequential, simply because the petitioner attempts to (as here) bootstrap to the Court's recent decision in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S.Ct. 706 (1989).[1]

In any event, the Court of Appeals' decision in this case and in *Cone* reflect no conflict even with the district court decisions cited by petitioners. *Contractors Ass'n of Eastern Pennsylvania, Inc. v. Philadelphia*, 735 F.Supp. 1274 (E.D. Pa. 1990), for example, is wholly consistent with both this case and with *Cone*. There the district court found that four of nine contractor-associations possessed standing to challenge the constitutionality of DBE requirements because the pleadings and proof established palpable injury to members of the associations from a loss of bids or an exclusion from specific markets.[2] Five

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[1] Decisions rendered well prior to *Croson* are inappropriate support for conflict-based review. The Court does not wield its jurisdiction to prognosticate how pre-*Croson* cases would have been decided in *Croson's* new context.

[2] Those members had established that they had been the lowest bidders but had been disqualified, had been precluded from submitting a bid, or had been disqualified because they were not a minority bidder.

associations which were unable to establish individualized injury to any of their members were denied standing.

Similarly, *Rhode Island Chapter, Associated General Contractors of America, Inc. v. Kreps*, 450 F.Supp. 338 (D.R.I. 1978), and *Constructors Ass'n of Western Pennsylvania v. Kreps*, 441 F.Supp. 936 (W.D. Pa. 1977), are in harmony with the Court of Appeals' decision and with *Cone*. In both *Rhode Island* and *Kreps*, the plaintiff-associations demonstrated that some of their members lost bids or contracts or, in *Kreps*, that they lost the opportunity to be selected as a subcontractor because of DBE requirements. Under these circumstances, the associations were found to possess the necessary standing to litigate the constitutional questions posed.

Petitioners hypothesize conflict with *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), and *Michigan Road Builders Ass'n, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987). (Petition at 20-21, n. 13). Neither *Fiedler* nor *Milliken* generates decisional conflict, however, since neither mentions, much less addresses or passes on any Article III standing issue.[3] Silence on an issue creates no implication of a position, as the *Cone* decision duly noted.

> We are aware that two recent decisions of this circuit did not explicitly address the issue of

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[3] Even the district court decisions in *Fiedler* did not address the issue of standing, apparently because the defendants did not raise the issue. *Milwaukee County Pavers Ass'n v. Fiedler*, 707 F.Supp. 1016 (W.D. Wis. 1989); *Milwaukee County Pavers Ass'n v. Fiedler*, 710 F.Supp. 1532 (W.D. Wis. 1989).

> standing and allowed contractors to pursue declaratory and injunctive relief against the operation of county and city minority business set-aside programs. . . . Since the opinions handed down in support of these decisions did not address the standing issue, *we infer no view* on the issue from these decisions.

Cone, 921 F.2d at 1207 n. 52 (citations omitted) (emphasis added).

CONCLUSION

Petitioners have not identified one single decision which has conferred standing based on allegations as remote from a genuine case or controversy as those asserted here. The absence of any allegation of specific, palpable injury of an individualized nature was properly viewed as fatal to petitioners' standing by both the District Court and the Court of Appeals. Nor has a faithful application of the law of standing by the Eleventh Circuit created decisional conflict among the federal appellate courts. For these reasons, petitioners' request for the issuance of a writ of certiorari should be denied.

Respectfully submitted,

JOHN J. COPELAN, JR., Esq.
Broward County Attorney
Government Center
Suite 423
115 South Andrews Avenue
Fort Lauderdale, Florida 33301

ARTHUR J. ENGLAND, JR., Esq.*
HENRY LATIMER, Esq.
CHARLES M. AUSLANDER, Esq.
FINE JACOBSON SCHWARTZ NASH BLOCK & ENGLAND
One CenTrust Financial Center
100 S.E. Second Street
Miami, Florida 33131
(305) 577-4000

Counsel for Respondents

*Counsel of Record

FILED
MAY 24 1991

(2)

No. 90-1587

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

CAPELETTI BROTHERS, INC.; WEEKLEY ASPHALT PAVING, INC.; WESTWIND CONTRACTING, INC.; and HARDRIVES COMPANY,

Petitioners,

v.

BROWARD COUNTY and L. A. HESTER,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

May 24, 1991

Counsel for *Amici Curiae*

31 p.

IN THE
SUPREME COURT OF THE UNITED STATES
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MOTION FOR LEAVE TO FILE BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioners' petition for a writ of certiorari. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents has

declined to consent to the filing. Accordingly, this motion is necessary.

The Washington Legal Foundation is a national public interest law and policy center with more than 120,000 members and supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial amount of time to advancing the cause of equal justice for citizens of all races and nationalities. To this end, WLF has appeared as *amicus curiae* before this Court and other state and federal courts on numerous occasions in civil rights cases. *See, e.g., Metro Broadcasting, Inc. v. FCC*, 110 S.Ct. 2997 (1990); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979). WLF has also appeared before this Court in numerous cases involving "standing" issues. *See, e.g., Lujan v. National Wildlife Federation*, 110 S.Ct. 3177 (1990).

WLF believes that all racial classifications established by governmental units are highly suspect and should be sustained in the face of court challenges only in the rarest of circumstances. WLF believes that courts should not create artificially high barriers that prevent those injured by such racial classifications from going to court to challenge the classifications. WLF is concerned that the Eleventh Circuit -- by announcing standing requirements unsupported by this Court's case law -- has created such barriers in this and related cases.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study

such as law and public policy, and has appeared as *amicus* before this Court on a number of occasions.

Amici believe that their experience in litigating civil rights and standing issues may prove of assistance to the Court in its consideration of this Petition. *Amici* also believe that their brief provides a perspective that differs from the perspective provided by the parties, due to *amici*'s strong commitment to a free market where individuals can compete without suffering from intentional discrimination because of the color of their skin.

For all the foregoing reasons, WLF and AEF respectfully request that they be allowed to participate in this case and file the annexed brief *amici curiae*.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

Counsel for *amici curiae*

May 24, 1991

QUESTION PRESENTED

Do construction contractors, who regularly bid on construction contracts offered by a county and who must comply with the county's race-conscious bid specifications in order to compete for the contracts, have standing to bring a facial constitutional challenge to the race-conscious requirements, when compliance with the county's requirements (1) limits the exercise of their business judgment to select subcontractors and suppliers; (2) increases their costs and risks; (3) decreases their profits; (4) limits their freedom to choose the subcontractors they believe could best complete the work; (5) puts in jeopardy the quality of work and the contractors' reputations; and (6) decreases the opportunities for them to subcontract and supply materials to other non-minority-owned contractors?

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IN THE
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF THE *AMICI CURIAE*

The interests of *amici curiae* Washington Legal Foundation and Allied Educational Foundation are set out fully in the Motion for Leave to file accompanying this brief.

STATEMENT OF THE CASE

Recent opinions of this Court have made abundantly clear that government-mandated classifications based on race are highly suspect, and that racial classifications are subject to exacting constitutional scrutiny regardless whether they favor whites or favor racial minority groups that historically have suffered from racial prejudice. *See, e.g., Wygant v. Jackson Board of Education*, 476 U.S. 267, 279-280 (1986); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, ___,109 S.Ct. 706, 721 (1989). As a result of such scrutiny, the Court struck down the Richmond, Virginia minority set-aside program at issue in *Croson* as a violation of the Equal Protection Clause. *Id.* at 723.

As the Eleventh Circuit itself has recognized, *Croson*'s rationale calls into question the constitutionality of many of the numerous state and local government programs that reserve a percentage of government contracts for minority contractors.[1] Accordingly, federal courts outside of the Eleventh Circuit have begun the arduous task of sorting out those minority set-aside programs that can survive the strict constitutional scrutiny mandated by *Croson* and those that cannot. The Eleventh Circuit, however, has pretermitted that effort by invoking unwarranted standing requirements against those seeking to challenge minority set-aside programs, thereby virtually insulating such programs from challenge. The Eleventh Circuit's crabbed view of standing in such cases, as enunciated in this case and a closely related case, *Cone*

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[1] *Northeastern Chapter of the Association of General Contractors of America v. City of Jacksonville, Florida*, 896 F.2d 1283, 1286 (11th Cir. 1990). *See also Associated Builders and Contractors of Louisiana, Inc. v. Orleans Parish School Board*, 919 F.2d 374, 377 (5th Cir. 1990)(the Supreme Court in *Croson* "articulated its general disdain for race- and gender-based preferences").

Corporation v. Florida Department of Transportation, 921 F.2d 1190 (11th Cir. 1991), *cert. petition pending*, Case No. 90-1535, merits review by this Court.[2]

The facts as alleged in Petitioners' complaint must be accepted as true, as this case comes to the Court on review of the district court's Rule 12(b)(6) dismissal of the complaint. In brief, Petitioners are challenging a minority set-aside program established by Broward County, Florida in connection with the award of public construction contracts. Broward County established its Small Disadvantaged Business Enterprise Affirmative Action Program (the "Program" or "Set-Aside Program") in 1984 in order to assist "small, disadvantaged business enterprises" in obtaining public construction contracts.[3] Petitioners are non-minority construction firms that regularly bid on Broward County construction contracts and that do not qualify as disadvantaged business enterprises ("DBEs").

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[2] The relationship between this case and *Cone Corporation* could not be closer. The Eleventh Circuit panel hearing this case affirmed the district court's dismissal in a one-sentence order that cited the Eleventh Circuit's opinion in *Cone Corporation* as the sole basis for affirmance. Accordingly, although this brief is filed in No. 90-1587 alone, *amici* believe that granting certiorari in No. 90-1535 as well as in No. 90-1587 will provide the Court with a richly detailed record suitable for mapping standing requirements in the numerous federal court challenges to minority set-aside programs.

[3] The Set-Aside Program defines "small, disadvantaged business enterprises" as businesses owned and operated by one or more of the following categories of individuals: Black Americans, Hispanic Americans, Asian-Pacific Americans, Native Americans, Asian-Indian Americans, women, and other persons found to be "socially and economically disadvantaged" by the federal Small Business Administration. Broward County, Florida Code § 20-275(2)(a).

Under the Set-Aside Program, Broward County establishes a goal for DBE participation in each public construction contract put out for bid. In order to meet that goal for any given contract, non-DBEs (such as Petitioners) must include in their contract bid a commitment to subcontract to DBEs a percentage of the total contract work (in an amount corresponding to the percentage DBE goal).[4]

Petitioners filed suit against Broward County in the United States District Court for the Southern District of Florida in March 1990, alleging that the Set-Aside Program violated their rights under the Equal Protection Clause of the Fourteenth Amendment and seeking an injunction against further enforcement of the Program. None of the Petitioners contended that it had been denied a construction contract by Broward County solely by reason of its failure to meet a DBE participation goal in a contract bid. Nonetheless, the complaint alleged that Petitioners had been injured in numerous ways by the Set-Aside Program as it has been applied by Broward County since 1984. For example, Petitioners alleged that the DBE subcontracting requirement deprived them of the profits that they would have earned had they not been required to subcontract work to DBEs but instead had performed the work themselves. Petitioners further alleged that the set-aside requirements "limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs or risks, decrease its profits, limit its freedom to choose the subcontractor it believes

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[4] The Set-Aside Program provides that the DBE participation goal for any given contract may be waived for good cause shown. Broward County, Florida Code § 20-276. Nonetheless, bidders on public contracts are *required* as part of their bids "to assure the county in writing of their programmed goal attainment or of their justification that all reasonable efforts have been made to that end." Code § 20-276(6).

could best complete the work and put in jeopardy the quality of work and the contractor's reputation." Complaint ¶ 50.

The district court granted Respondents' motion to dismiss the case in June 1990, finding *inter alia* that Petitioners lacked standing to bring suit. *Capeletti Brothers, Inc. v. Broward County*, 738 F. Supp. 1415 (S.D. Fla. 1990).[5] The district court refused to accept Petitioners' allegations that the Set-Aside Program had reduced Petitioners' profits. Rather, the district court held:

> Accepting as true that the set-aside program increases costs, there is no injury to the bidders or their profits. It would be the irrational businessman who did not factor such costs into his bid. Thereby, it is the county who ultimately absorbs the costs of its program by paying more to complete public construction contracts.

Id. at 1417. The court held alternatively that even if Petitioners could establish that they had been injured by the Set-Aside Program, such injury was insufficient to establish standing because:

> [E]ven if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid, the plaintiffs cannot show that this harm is unique to them and different from other bidders. Because all rational bidders would factor the program costs into their bid, no contractors have

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[5] The district court also dismissed the complaint based on another, closely related ground: that the case was not ripe for review. *Id.* at 1417. The court of appeals did not address the ripeness issue and thus that issue is not properly before the Court at this time.

> a competitive advantage over the plaintiffs since all the bidders comply with the program's requirements.

Id.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissal in a one-sentence, unpublished order: "Affirmed on the basis of *Cone Corp. v. Florida Dept. of Transportation*, 921 F.2d 1190 (11th Cir. 1991)."[6] Petitioners filed a timely petition for writ of certiorari on April 12, 1991.

REASONS FOR GRANTING THE PETITION

I. THE COURT OF APPEALS' DECISIONS CONFLICT WITH OTHER FEDERAL COURT DECISIONS AND SERIOUSLY MISINTERPRET THIS COURT'S DECISIONS REGARDING STANDING TO SUE.

The court of appeals' decisions in this case and in *Cone Corporation* raise important issues of national significance. Ever since this Court's *Croson* decision, the

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[6] As noted above (*see* fn. 2), a petition for a writ of certiorari in *Cone Corporation* (No. 90-1535) currently is before the Court. In *Cone Corporation*, the Eleventh Circuit reversed a judgment striking down portions of a State of Florida minority set-aside program, finding that the plaintiffs lacked standing to challenge the program. Since the Eleventh Circuit's decision in this case incorporates the reasoning of *Cone Corporation*, this brief periodically cites to *Cone Corporation* when stating the Eleventh Circuit's rational for upholding the dismissal of Petitioners' complaint. The Eleventh Circuit's opinion in *Cone Corporation* underscores the close relationship between the two cases: in holding that the *Cone Corporation* plaintiffs lacked standing to challenge the State of Florida set-aside program, the Eleventh Circuit quoted extensively from the district court's opinion in this case. *See Cone Corporation*, 921 F.2d at 1210 n.57.

constitutionality of numerous state and local government minority set aside programs has been challenged in courts across the country; the "standing" issue addressed by the Eleventh Circuit is outcome-determinative in many such cases. Moreover, the court of appeals' decision seriously misinterprets this Court's decisions regarding standing to sue and is in direct conflict with a decision of the Seventh Circuit and several federal district court decisions. Accordingly, *amici* submit that the Court should grant the petitions for writs of certiorari in Nos. 90-1535 and 90-1587.

A. That Petitioners' Injury May Be Shared Equally by Other Contractors Does Not Negate Petitioners' Showing That They Have, in Fact, Been Injured.

The basic principles underlying what a plaintiff must show in order to establish "standing" to sue in federal court are not seriously disputed by the parties and were accurately set forth by the courts below. Article III of the Constitution requires the party who invokes a federal court's authority to show: (1) "that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant" (also referred to "injury in fact"); (2) "that the injury fairly can be traced to the challenged action"; and (3) that the injury "is likely to be redressed by a favorable decision." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

The Eleventh Circuit went astray due to its misperception of what constitutes an "injury in fact" for purposes of standing analysis. The Eleventh Circuit held that Petitioners failed to adequately allege "injury" because they did not allege that they lost any particular

contract as a result of the Set-Aside Program; the court of appeals held that other types of alleged injury were insufficient to satisfy the "injury in fact" requirement. *Cone Corporation*, 921 F.2d at 1206-1210. The district court also viewed loss of a particular contract due to the Set-Aside Program as an essential ingredient of a cognizable injury. *Capeletti Brothers*, 738 F. Supp. at 1417.

The lower courts' definition of what constitutes "injury in fact" is seriously in error. Clearly, one who alleges loss of a contract due to racial discrimination has alleged a significant injury; but one need not allege such a significant injury in order to adequately plead "injury in fact." This Court has made clear that even an "identifiable trifle" can be sufficient to establish "injury in fact" (*United States v. Students Challenging Regulatory Agency Procedures [SCRAP]*, 412 U.S. 669, 689 n.14 (1973)), and Petitioners' alleged injuries amount to far more than an "identifiable trifle." Petitioners have alleged that the DBE subcontracting requirement deprived them of the profits that they would have earned had they not been required to subcontract work to DBEs but instead had performed the work themselves. Petitioners further alleged that the Set-Aside requirements "limit the exercise of a general or prime contractor's business judgment, increase the contractor's costs or risks, decrease its profits, limit its freedom to choose the subcontractor it believes could best complete the work and put in jeopardy the quality of work and the contractor's reputation." Complaint ¶ 50. In order to establish standing at the trial/summary judgment stage, Petitioners would have to introduce evidence to support its allegations of injury; but at the pleadings stage, Petitioners' allegations -- by pro-

viding numerous examples of out-of-pocket monetary loss -- are more than sufficient to plead "injury in fact."[7]

The lower courts held that the alleged injuries cited above did not constitute "injury in fact" because any such injuries were not unique to Petitioners but rather were injuries suffered by all construction contract bidders. *See Cone Corporation*, 921 F.2d at 1210 n.57 ("[e]ven if the contractor does not always include the increased cost in its bid, as the plaintiffs' evidence seems to indicate, the resulting smaller profits are a problem common to all contractors"); *Capeletti Brothers*, 738 F. Supp. at 1417 ("the plaintiff cannot show that this harm is unique to them and different from other bidders ... no contractors have a competitive advantage over the plaintiffs since all the bidders comply with the program's requirements"). That holding is directly contrary to numerous decisions of this Court; there is no requirement that an injury must be unique to plaintiffs in order to qualify as "injury in fact"

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[7] Petitioners' allegations of injury must be accepted as true, as this case comes to the Court on review of the district court's Rule 12(b)(6) dismissal of the complaint. *See Lujan v. National Wildlife Federation*, 110 S.Ct 3177, 3189 (1990); *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("[f]or purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party"). The district court did not believe Petitioners' allegations that they had been injured; the district court thought that only an "irrational businessman" would not factor into his bid price any costs associated with complying with the Set-Aside Program. *Capeletti*, 738 F. Supp. at 1417. The district court apparently recognized, however, that a dismissal based on a refusal to credit well-pled allegations of injury would have been improper, because it went on to base its "no standing" finding on other grounds "even if there was an actual cost borne solely by the plaintiffs that could not be factored into a bid." *Id.* While it is conceivable that Petitioners would be unable to demonstrate at trial that they did not factor all such costs into their bids, that issue clearly cannot be resolved at the pleadings stage.

for standing purposes. *See, e.g., Warth v. Seldin*, 422 U.S. at 501 ("[o]f course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, *even if it is an injury shared by a large class of other possible litigants*") (emphasis added); *SCRAP*, 412 U.S. at 688 ("[t]o deny standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody. We cannot accept that conclusion").[8]

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[8] While the Court has squarely rejected claims that a plaintiff must demonstrate the uniqueness of his injury in order to establish Article III "injury in fact," the Court has imposed "prudential" limitations on standing such that standing is denied where "the asserted harm is a generalized grievance shared in substantially equal measure by all or a large class of citizens." *Warth v. Seldin*, 422 U.S. at 499. Thus, the Court denied standing to the plaintiffs in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), who claimed to have been injured in their capacity as citizens of the United States by alleged violation of the Constitution's Incompatibility Clause by Members of Congress who simultaneously served as members of the armed forces reserves. The Court said that standing to sue may not be predicated merely on U.S. citizenship "because of the necessarily abstract nature of the injury all citizens share." *Id.* at 220. The Court said that plaintiffs should not be accorded standing to sue in such cases because such abstract injuries are not sufficiently concrete to enable "a complainant authoritatively to present to a court a complete perspective upon the adverse consequences flowing from the specific set of facts undergirding his grievance." *Id.* at 221. The "prudential" limitations upon standing discussed in *Warth* and *Schlesinger* are clearly inapplicable to this case. Even if Petitioners' injuries are suffered by all other bidders on Broward County construction contracts, the class of those suffering harm is still a tiny percentage of U.S. citizens: it consists of a group of no more than several hundred construction companies. There is no suggestion that Petitioners' alleged injuries are in any way "abstract"; to the contrary, Petitioners allege that their injuries have been in the form of concrete, dollars-and-cents losses.

Moreover, the lower courts' findings that no contractors had a competitive advantage over Petitioners is contradicted by the record below. As the Eleventh Circuit noted in *Cone Corporation*, "A DBE prime contractor that is the low bidder on a contract containing a DBE goal is not required to meet the subcontracting goal, as its participation as prime contractor allows the entire amount of the contract to be counted toward the overall DBE goal." *Id.*, 921 F.2d at 1196 n.20. Thus, DBE prime contractors have a competitive advantage over Petitioners, because they have a greater flexibility in choosing the most-qualified and lowest-cost subcontractors or in electing not to subcontract any work and thereby increasing their profit. In sum, the lower courts' conclusion that Petitioners did not suffer "injury in fact" is a clear error of law.

B. The Eleventh Circuit's Decisions Directly Conflict With a Seventh Circuit Decision and Numerous Other Federal Court Decisions.

The Eleventh Circuit's decisions in this case and in *Cone Corporation* merit review by this Court for the additional reason that they conflict with a decision of the Seventh Circuit as well as with decisions from numerous other federal courts. It is essential that the Court grant certiorari in order to resolve the confusion that reigns in the lower federal courts regarding what constitutes "injury in fact" in cases challenging minority set-aside programs.

In *Milwaukee County Pavers Association v. Fiedler*, 922 F.2d 419 (7th Cir. 1991), the Seventh Circuit struck down portions of several Wisconsin highway contract minority set-aside programs as violations of the Equal Protection Clause. Before reaching the merits of the programs, the Seventh Circuit explicitly found that the plaintiff contractors had been injured by the programs:

"The reason the latter ... feature of the programs [requiring that subcontracts be granted to DBEs] *harms the contractors* is that it both requires them to award some subcontracts to contractors that are not the low bidders and (like the prime set-aside program) limits their own ability to compete for subcontracts." *Id.* at 421 (emphasis added).[9] Accordingly, the Seventh Circuit's *Milwaukee County Pavers* decision is in direct conflict with the Eleventh Circuit's decisions in this case and *Cone Corporation*; the very same allegations that the Eleventh Circuit found insufficient to bestow standing on Petitioners were found sufficient by the Seventh Circuit to permit it to reach the merits of a challenge to a minority set-aside program.

The Eleventh Circuit's decisions in this case and *Cone Corporation* also appear to be in direct conflict with another recent Eleventh Circuit opinion: *S.J. Groves & Sons Co. v. Fulton County*, 920 F.2d 752 (11th Cir. 1991). *S.J. Groves* involved a challenge to two Georgia minority set-aside programs; the court held that the plaintiffs had standing to challenge one of the programs (where they had lost a contract due to an alleged failure to make a good-faith effort to meet a DBE goal) but not the other. Although the court rejected Grove's claim that the second program's subcontracting requirement constituted "injury in fact" because it prevented Groves from earning an extra profit by performing the subcontracts itself, the court did so *solely* because Groves had never bid on any contracts under the challenged program. *Id.* at 758. The clear implication of *Groves* is that one who does regularly bid on contracts subject to a DBE subcontract goal -- as is true of Petitioners in this case -- can establish "injury

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[9] No plaintiff in *Milwaukee County Pavers* specified any particular contract that it allegedly had lost as a result of the Wisconsin set-aside programs.

in fact" by alleging that one is prevented from performing the subcontracts oneself.

Other courts of appeals have reached the merits of such challenges without discussing the standing issue. Given that a federal court lacks jurisdiction to hear a case brought by a plaintiff lacking Article III standing (and thus that a federal court has an obligation to dismiss a case brought by a plaintiff lacking standing, even when the parties fail to raise the standing issue), the willingness of other courts of appeals to reach the merits of challenges to set-aside programs -- despite a lack of any showing by the plaintiffs that they had lost contracts as a result of the programs -- is some indication that those courts implicitly decided the standing issue in favor of the plaintiffs.[10] *See, e.g., Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989); *Associated General Contractors of*

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[10] Indeed, the court in *Cone Corporation* conceded that two other Eleventh Circuit panels had reached the merits of challenges to set-aside programs in factually similar circumstances; the court attempted to distinguish those cases by arguing that no view on the standing issue could be inferred from the two prior decisions because neither decision directly addressed that issue. *Cone Corporation*, 921 F.2d at 1207 n.52. While one of the two prior decisions (*Cone Corp. v. Hillsborough County*, 908 F.2d 908 (11th Cir.), *cert. denied*, 111 S.Ct. 516 (1990)) can plausibly be distinguished on that ground, the other cannot. In *Northeastern Florida Chapter of the Association of General Contractors v. City of Jacksonville, Florida*, 896 F.2d 1283 (11th Cir. 1990), the majority reached the merits of a set-aside program challenge despite the objections of Judge Tjoflat (in a special concurrence) that the plaintiffs lacked standing to raise the challenge. Since Judge Tjoflat's special concurrence had called attention to the standing issue and since the majority clearly understood that it lacked jurisdiction to hear the case if the plaintiffs lacked standing, one can reasonably conclude that the majority decided that the plaintiffs had standing. Accordingly, the Eleventh Circuit's decisions in this case and in *Cone Corporation* also conflict with the Eleventh Circuit's *Northeastern Florida* decision.

California, Inc. v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987).

Moreover, as the Eleventh Circuit acknowledged in *Cone Corporation*, 921 F.2d at 1210 n.57, its decisions are in direct conflict with several federal district court opinions. *See Contractors Association v. City of Philadelphia*, 735 F. Supp. 1274, 1283-84 n.3 (E.D. Pa. 1990) (finding standing for an association of contractors who alleged, *inter alia*, that the expenses of one contractor member on a specific contract were higher because of MBE requirements); *Rhode Island Chapter, Associated General Contractors v. Kreps*, 450 F. Supp. 338, 346-47 n.3 (D.R.I. 1978) ("even the successful bidder reduces his profit by having to subcontract work he could have performed himself"); *Constructors Association v. Kreps*, 441 F. Supp. 936, 945-46 (W.D. Pa. 1977).

On the other hand, *Cone Corporation* is not simply an aberrant decision that this Court can safely ignore because it is unlikely to be followed elsewhere. At least one federal district court outside the Eleventh has cited *Cone Corporation* as authority for finding that a contractors' association lacked standing to challenge a minority set-aside program. *See Michigan Road Builders Association, Inc. v. Blanchard*, 1991 U.S. Dist. LEXIS 5028 (W.D. Mich. 1991).[11] Accordingly, the Court should grant certiorari in this case to resolve the conflict within

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[11] Ironically, the lawsuit dismissed by the district court for lack of standing involved precisely the same parties and virtually the same issues as were involved in a successful challenge to an earlier Michigan minority set-aside program. Although the standing allegations in the prior lawsuit differed little from the standing allegations in the suit dismissed by the district court, this Court summarily affirmed a Sixth Circuit decision striking down the earlier program. *Michigan Road Builders Association, Inc. v. Milliken*, 834 F.2d 583 (6th Cir. 1987), *aff'd*, 489 U.S. 1062 (1989).

the lower federal courts regarding this important and recurring aspect of standing doctrine.

II. THE COURT OF APPEALS' DECISIONS IMPROPERLY INJECT AN EXHAUSTION OF REMEDIES REQUIREMENT INTO EQUAL PROTECTION LITIGATION.

The Eleventh Circuit ultimately grounded its dismissal of these cases on the plaintiffs' alleged failure to establish standing. However, much of the discussion in *Cone Corporation* focused on the many administrative avenues for relief allegedly available to a contractor unhappy with the DBE set-aside program. *See, e.g., id.*, 921 F.2d at 1192-1203, 1206-09. The focus and language of *Cone Corporation* suggest that the Eleventh Circuit has incorporated an exhaustion of administrative remedies requirement into its standing analysis. Denial of standing to plaintiffs who allegedly have failed to exhaust remedies is absolutely contrary to this Court's case law and provides an additional reason to review the decisions below.

The courts below correctly noted that the plaintiffs were not challenging past contract awards or seeking to recover damages, but rather were mounting facial challenges to the set-aside programs. *Id.* at 1203-05. Accordingly, the courts held (again correctly), that one alleging "injury in fact" must allege facts demonstrating a likelihood that "he is likely to suffer future injury." *Id.* at 1203. The courts below erred, however, in concluding that since the challenged programs permitted contractors to protest the application of set-aside goals to particular contracts, there was no evidence that any such goals would ever be applied to the plaintiffs and thus that they

would ever suffer any injury. *See id.* at 1206-09; *Capeletti Brothers*, 738 F. Supp. at 1417.[12]

In so holding, the Eleventh Circuit is, in effect, requiring contractors to exhaust state administrative remedies before bringing a facial challenge to a minority set-aside program. Under the Eleventh Circuit's rationale, a contractor could never seek to enjoin future enforcement of a minority set-aside program by bringing a facial challenge to the program, because there can be no evidence that the program will be enforced as written (and thus no evidence of "injury in fact") unless the contractor pursues administrative remedies. Such an exhaustion requirement in civil rights cases of this sort is clearly contrary to established case law of this Court. *See Patsy v. Board of Regents of State of Florida*, 457 U.S. 496 (1982) (exhaustion of state administrative remedies not a prerequisite to action (as here) under 42 U.S.C. § 1983).

Petitioners cannot, of course, predict with 100% assurance that the Set-Aside Program will be enforced in an unconstitutional manner in the future and that they will thereby be injured; but such 100% assurance is not required to establish "injury in fact." Rather, Petitioners need only establish a likelihood of future injury, which likelihood can be established by alleging a history of prior constitutional violations causing injury to Petitioners. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983); *O'Shea*

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[12] Indeed, the Eleventh Circuit attempted to distinguish these cases from this Court's decision in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), on precisely this ground. The Court held in *Fullilove* that a group of contractors had standing to bring a facial challenge to the federal Public Works Employment Act of 1977. *Id.* at 480 n.71. The Eleventh Circuit distinguished *Fullilove* by noting that the plaintiffs in these two cases had a protest procedure available to them, while the plaintiffs in *Fullilove* did not. *Cone Construction*, 921 F.2d at 1209 n.56.

v. Littleton, 414 U.S. 488, 495-96 (1974) ("[o]f course, past wrongs are evidence bearing on whether there is a real or immediate threat of repeated injury"). Petitioners have made such allegations. *See* Petitioners' Complaint ¶¶ 48-54. To hold that Petitioners have not made sufficient allegations to establish "injury in fact" is to improperly incorporate into standing doctrine a requirement that they exhaust all administrative remedies made available by Respondents before coming into federal court -- despite the absence of any evidence that Respondents will not continue to enforce the Set-Aside Program in an unconstitutional manner.

In sum, the Eleventh Circuit's incorporation of an exhaustion of remedies requirement into the showing necessary to establish standing to challenge a minority set-aside program is contrary to this Court's case law and thus provides an additional reason for granting certiorari in this case.

III. THE ELEVENTH CIRCUIT HAS ESTABLISHED A RACIAL DOUBLE-STANDARD IN DETERMINING WHO HAS STANDING TO SUE.

The Eleventh Circuit's decisions in this case and in *Cone Corporation* are especially troublesome when one contrasts them with the liberal standing requirements normally employed by the Eleventh Circuit, particularly in cases involving claims of racial discrimination against members of racial minority groups. This racial double-standard has no place in modern American jurisprudence. The court should grant certiorari in this case in order to reaffirm the principles that justice is color-blind and that all citizens -- regardless of race -- have equal access to the courthouse door.

Smith v. Meese, 821 F.2d 1484 (11th Cir. 1987), is typical of the liberal approach on standing questions normally taken by the Eleventh Circuit in cases brought by racial minority groups. In *Smith*, the plaintiffs -- black voters and elected officials in Alabama -- alleged that the U.S. Attorney General and other top Justice Department officials were violating their constitutional rights by launching investigations into alleged election crimes committed by blacks but failing to conduct similar investigations into alleged election crimes committed by whites. The suit alleged that this discriminatory enforcement policy had "chilled" the plaintiffs' exercise of their political and associational rights, *but none of the plaintiffs was actually the target of any Justice Department investigation*. *Id.* at 1495. The court held that the plaintiffs had standing to pursue their claims; an allegation that the plaintiffs, along with other citizens, had suffered a generalized "harm from an unconstitutional pattern and practice of discriminatory prosecutions and investigations" focused on others, was held sufficient to establish "injury in fact." *Id.*

Similarly, in *Watts v. Boyd Properties*, 758 F.2d 1482 (11th Cir. 1985), the Eleventh Circuit held that a black "tester" had standing to challenge the defendant's allegedly racially discriminatory rental policies, even though she lacked any intent to rent an apartment from the defendant had one been offered. The court said, "[E]ven if a tester is motivated solely by the desire to challenge the legality of allegedly discriminatory practices, this is a sufficient purpose to confer standing." *Id.* at 1482.[13] And

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[13] In so holding, *Watts* goes well beyond this Court's holding that Fair Housing Act "testers" have standing to sue for violations of the Act if they can demonstrate that a defendant's conduct deprived them of the "important social, professional, business and economic, political

(continued...)

in *EEOC v. Mississippi College*, 626 F.2d 477, 483-84 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981),[14] the court of appeals held that a white woman had standing to bring a Title VII claim against her employer based on allegations of racial employment discrimination against blacks; the court held that she had sufficiently alleged injury because the alleged practices violated "her own personal right to work in an environment unaffected by racial discrimination."

Indeed, the Eleventh Circuit liberal approach to standing requirements appears to extend to everyone except white males raising race and sex discrimination claims. *See, e.g., Chiles v. Thornburgh*, 865 F.2d 1197, 1209 (11th Cir. 1989) (citizens of Dade County, Florida have standing to challenge operation of federal alien detention center within the county, despite fact that all citizens of county are equally affected by its operation); *Sims v. Florida Department of Highway Safety and Motor Vehicles*, 862 F.2d 1449, 1458-59 (11th Cir. 1989) (*en banc*) (importers of "gray market" automobiles had standing to challenge state law regarding titling of such automobiles, despite fact that law had no direct effect on importation); *Saladin v. City of Milledgeville*, 812 F.2d 687 (11th Cir. 1987) (citizens of city had standing to

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[13] (...continued)
and aesthetic benefits of interracial associations that arise from living in integrated communities free from discriminatory housing practices." *Havens Realty Corp. v. Coleman*, 455 U.S. 361, 376 (1982). Granting standing based on a mere "desire to challenge the legality of allegedly discriminatory practices" (*Watts*, 758 F.2d at 1485) does not even require the plaintiff to live in the community allegedly affected by the discriminatory housing practices.

[14] The Eleventh Circuit has adopted as binding precedent within the circuit all Fifth Circuit decisions rendered prior to October 1, 1981. *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (*en banc*).

challenge inclusion of word "Christianity" on city seal, despite fact that the word was too small to be legible); *Lynch v. Baxley*, 744 F.2d 1452, 1457 (11th Cir. 1984) (plaintiff had standing to challenge civil commitment procedures, despite fact that he was not in custody at time of filing suit, because there was reasonable likelihood that he would again be committed and would again be subjected to allegedly unconstitutional commitment procedures).

There is little doubt that under the standing requirements normally imposed by the Eleventh Circuit, Petitioners have standing to challenge the Set-Aside Program. If a mere "desire to challenge the legality of allegedly discriminatory practices" was sufficient to confer standing on the plaintiff in *Watts*, then surely Petitioners -- who have alleged significant economic loss as a result of an allegedly discriminatory set-aside program -- have standing to challenge the program. Accordingly, the need to eliminate the racial double-standard imposed by the Eleventh Circuit in the standing arena provides an additional reason for issuing a writ of certiorari in this case.

CONCLUSION

For the foregoing reason, *amici* respectfully submit that the petition should be granted.

Respectfully submitted,

DANIEL J. POPEO
RICHARD A. SAMP
(Counsel of Record)
WASHINGTON LEGAL
FOUNDATION
1705 N Street, N.W.
Washington, DC 20036
(202) 857-0240

May 24, 1991